Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-941

PAUL H. GIBSON, SHERIFF OF GUILFORD COUNTY

Petitioner,

v.

VOULYNNE SMALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Voulynne Small respectfully opposes the petition for writ of certiorari in this proceeding, seeking to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on September 26, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 541 F.2d 277 (4th Cir. 1976), and is set out in the petition for certiorari (A-10 to 11). The opinion of the United States District Court for the Middle District of North Carolina is not published, but is set out in the petition for certiorari (A-1 to 9).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. sec. 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 26, 1976. As stated below, respondent contends that this proceeding should be dismissed for failure to file petition for writ of certiorari within the time provided by law.

QUESTIONS PRESENTED

1. Whether a law enforcement officer discharged for immoral conduct with married persons and intoxication, is entitled to notice and hearing.

2. Whether the district court abused its discretion in regarding the parties to

have litigated by consent the issue of denial of respondent's liberty interest.

3. Whether the petition for certiorari should be dismissed for not having been filed within the time allowed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The relevant portion of the Fourteenth Amendment to the United States Constitution provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law."

2. 42 U.S.C. sec. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

BEST COPY AVAILABLE

STATEMENT OF THE CASE

Respondent, a black female, was employed by defendant, the Sheriff of Guilford County, on January 8, 1973, to serve as a juvenile detective in the Guilford County Sheriff's Department. On February 9, 1973, respondent was summarily discharged without notice and hearing. (Court of Appeals Appendix 1, 10, 57, 60-61).

Petitioner's reasons for discharging respondent were that she had engaged in immoral conduct with married men and that she had become intoxicated. (Court of Appeals Appendix 60-61).

At the time of discharge respondent was in a training status in the Sheriff's department. (Court of Appeals Appendix 58). Respondent has not contended that she had a permanent position of employment with the department.

On February 5, 1973, respondent began a two-week school on narcotics and drugs at Guilford Technical Institute, as a part of her training in the department. While attending this school, she became acquainted with Purvis Rogers and Joseph Buck, members of the New Bern, North Carolina, police department, who were fellow students. (Court of Appeals Appendix 58).

On February 6, respondent had lunch with Messrs. Rogers and Buck. By prearrangement on February 7, at about 10:00 P. M., respondent and Guilford County Sheriff's Deputy Harry Knight went to the motel room of Messrs. Rogers and Buck. The four of them remained in the room until about 12:30 A. M. During this time Messrs. Rogers and Buck consumed moderate amounts of alcohol. The evidence is in conflict as to whether respondent had anything to drink on this occasion. The door of the motel room was left open during at least a portion of the time of the visit. While in the room, the four officers discussed law enforcement matters, carried on casual conversation, and watched television. Respondent and Mr. Knight drove back together. (Court of Appeals Appendix 59).

On February 8, respondent went to dinner with Mr. Rogers, and returned with him to the motel room at about 7:30 or 8:00 P. M. They were expecting Mr. Knight to join them again. However, he called at about 9:00 P. M. to say that he was tied up in an investigation and would not be able to meet them. Messrs. Rogers and Buck again consumed alcoholic beverages, but respondent states that she did not. The door to the motel room was left open. (Court of Appeals Appendix 59).

During the time of her employment with petitioner, respondent had been regularly dating Jerry Brown, to whom she is now married. Mr. Brown was at that time married to his first wife, but had been separated from her for several months. (Court of Appeals Appendix 60).

Deputy Sheriff Knight reported to his supervisors and to petitioner, that he had accompanied respondent to the motel room on February 7, and by telephone had ascertained respondent's presence in the room on February 8. Mr. Knight stated that respondent had consumed alcoholic beverages and in his opinion had become intoxicated. He stated that Mr. Rogers had attempted to talk Mr. Knight into leaving him alone with respondent. Mr. Knight told his supervisors and petitioner that he had seen respondent's automobile in the Holiday Inn parking lot between 2:00 and 3:00 A. M. on February 8, but he testified only that this automobile resembled respondent's and that he had not ascertained the identification or registration of it. Mr. Knight also reported that respondent was regularly going out with a married man (referring to Jerry Brown), who was living with his wife. (Court of Appeals Appendix 59-60).

On the basis of the information received from Mr. Knight and without further

investigation, petitioner instructed his administrative assistant on February 9, 1973, to discharge respondent.

There is a Guilford County Sheriff's Department general order which provides that intoxicants shall not be consumed while on duty. Petitioner interprets this order to the effect that social drinking or moderate consumption of alcoholic beverages, not during duty hours, is permissible. (Court of Appeals Appendix 57-58). Four Sheriff's deputies, all of them white, had been discharged within the five years preceding respondent's discharge for violation of this general order. One of these individuals was arrested for public drunkenness and disorderly conduct; another was arrested for driving under the influence of alcohol. Two of the individuals were observed to be under the influence of alcohol while on the job. (Court of Appeals Appendix 61).

Petitioner's same general order provides that the employees of the department are not to act in any manner to bring reproach on the department, and are to live a civil and orderly life. (Court of Appeals Appendix 57-58). During the five years preceding respondent's discharge, four white deputies were discharged for sexual immorality in violation of the same general order. All four of these individuals either had lived with or

spent the night with persons of the opposite sex to whom they were not married. (Court of Appeals Appendix 61).

Following respondent's discharge, Petitioner called the New Bern chief of police and arranged a meeting with him in Greensboro. Petitioner met with the chief on about February 16, at which time petitioner accused respondent and Mr. Rogers of having occupied a motel room together. Messrs. Rogers and Buck were present at the meeting, and they pointed out that not Mr. Rogers alone, but both of them were present in the room with respondent. (Court of Appeals Brief of Appellee, 27-31, 44-47). At that time petitioner denounced respondent and Messrs. Buck and Rogers for immoral behavior, and recommended the dismissal of the New Bern officers. (Court of Appeals Brief of Appellee 28, 36-37).

On cross examination petitioner testified:

> Q. And you have told, have you not, under oath in the pleadings here and to me and to anyone who has come to you and inquired about why Miss Small was let go, you have told, she was let go on account of drinking and on account of being in a motel room with men?

> A. Drinking and in the company of two married men and being in the car. (Court of Appeals Brief of Appellee 47).

Following respondent's termination, petitioner told respondent's father that the reasons for her termination were her drinking and immoral conduct. (Petition for certiorari 4).

Following her discharge, respondent made diligent and good faith efforts to secure new employment. (Court of Appeals Appendix 61-62). Respondent made applications to 109 different prospective employers until she finally secured a position as a counselor with Craven Community College in May, 1974. (Court of Appeals Appendix 39-45, 62). Six of the positions for which respondent applied were in the law enforcement field. (Court of Appeals Appendix 39-44). Prior to obtaining full time employment, respondent worked on and obtained her master's degree and held two temporary jobs. (Court of Appeals Appendix 62).

The district court concluded that, "Since the plaintiff was discharged for alleged intoxication and immoral conduct, her termination was based on reasons which would tend to damage her standing and associations in her community by tarnishing her

reputation and good name. Termination for these reasons would also impose on plaintiff a stigma or employment record that would foreclose her freedom to take advantage of other employment opportunities. Therefore, the plaintiff was entitled to notice of the reasons for discharge and the opportunity for a hearing to refute the charges." (Court of Appeals Appendix 62-63).

However, the court decided that respondent's allegation of racially discriminatory discharge was not supported by the evidence. (Court of Appeals Appendix 63-65).

The court computed respondent's back pay entitlement to be $4,092.66, and a judgment in that amount was entered. (Court of Appeals Appendix 55, 65-68).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed the district court, finding that petitioner had published the reasons for respondent's dismissal, holding the decision consistent with Bishop v. Wood, __ U.S. __, 48 L.ed.2d 684 (1976). Petitioner petitioned the court of appeals for a rehearing in banc, and this petition was denied by order of October 21, 1976. (Petition for Certiorari A-10 to 11).

REASONS FOR DENYING THE WRIT

I. CONSISTENT WITH THIS COURT'S DECISION OF BISHOP V. WOOD, RESPONDENT WAS ENTITLED TO NOTICE AND HEARING IN CONNECTION WITH HER DISCHARGE, SINCE PETITIONER'S ANNOUNCED REASONS FOR THE TERMINATION WERE IMMORAL CONDUCT WITH MARRIED PERSONS AND INTOXICATION.

Without regard to whether respondent as a public employee had a "property interest" to continued employment, she had a constitutionally protected "liberty interest", which was infringed when she was discharged without notice and hearing after having been accused of misconduct. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

In Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), the Court decided that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Roth requires that procedural due process be satisfied before an employee is dismissed where a charge has been made "that might seriously damage his standing and associations in the community . . ., for example that he has been guilty of dishonesty, or immorality". 408 U.S. at 573 [Emphasis supplied]. The

Court in Roth expressed a concern about the likelihood of the government's imposition on the employee of a "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. The right of "liberty" includes the right to "engage in any of the common occupations of life". Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Where future employment opportunities are threatened or foreclosed, procedural due process applies. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185 (1951) (Jackson, concurring); Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957).

In the present case petitioner discharged respondent for allegedly engaging in immoral conduct with married men and becoming intoxicated. The present facts fit clearly within the rule of Board of Regents v. Roth,

Bishop v. Wood, U.S. 48 L.ed.2d 684 (1976), made it clear that the communication of the governmental employer's stigmatizing allegations must be public, so that there would be some likelihood of actual interference with prospective employment, before the constitutionally protected liberty interest is deemed invaded. In Bishop v. Wood the stigmatizing reasons for discharge of a policeman were communicated to him orally in private and were also stated in answer to interrogatories during the course

of that lawsuit. The Court concluded that Bishop's liberty interest was not invaded under these circumstances since the first communication was not made public, and the police chief was immunized from liability from answers to interrogatories under oath that were filed in court.

In contrast to Bishop v. Wood, the record in the present case shows that within a week after firing respondent, petitioner got in touch with the chief of police of New Bern, met with him and accused respondent and New Bern police officers Buck and Rogers of immoral behavior. (Court of Appeals Brief of Appellee 27-31, 44-47). Petitioner acknowledged under cross examination that "To anyone who has come to [me] . . . and inquired about why Miss Small was let go, [I] . . . have told she was let go on account of drinking and on account of being in a motel room with men." (Court of Appeals Brief of Appellee 47). Petitioner also told respondent's father that he had dismissed her for immoral conduct and drinking. (Petition for Certiorari 4). In addition it can readily be inferred that petitioner's reasons for discharging respondent were publicized, from the fact that she was unable to find permanent employment for about fifteen months during which time she made applications to in excess of 100 prospective employers. (Court of Appeals

Appendix 39-45, 61-65).

The present case differs from Bishop v. Wood in this important respect: the condemnatory statements about Bishop were made in private, but those about respondent were made in public. As stated by the court of appeals in its opinion, "The Court reasoned that if the reasons were not made public, no stigma could result, no matter how serious or false the grounds for discharge. This case is different; here the Sheriff publicized his reasons." (Petition for Certiorari A-11).

The case of Paul v. Davis, __ U.S. __, 47 L.ed.2d 405 (1976), relied upon by petitioner, is not at all applicable. There the Court simply held that the Civil Rights Act, 42 U.S.C. sec. 1983, does not include a federally remediable tort of defamation. The Court did not overrule and in no way disapproved of Board of Regents v. Roth, supra, and Wisconsin v. Constantineau, supra. The Court distinguished these and other cases, holding that an actionable claim of deprivation of the Fourteenth Amendment interest in liberty arises where stigmatizing statements are made in connection with the denial of some benefit or privilege, such as government employment.

Petitioner's reading of Bishop v. Wood, is strained indeed; he seems to be of the view that the statements of aspersion must

be made to the public at the very moment of the employee's discharge; respondent must contemplate that the holding of a press conference or an announcement in a public meeting at the instant of dismissal is a prerequisite to liability. If this were so, all of the substance would be drained from the "liberty" interest that public employees have under the Fourteenth Amendment, identified in Board of Regents v. Roth. A much more sensible view, one that is consistent with this Court's reasoning in Bishop v. Wood, is to hold the liberty interest invaded whenever public statements are made by the employer in such proximity to the discharge, as to be reasonably likely to interfere with the employee's efforts to secure new employment. Such was the case here.

Finally petitioner contends that no damages should have been awarded in this case without proof of "actual injury or actual loss." Petitioner concedes, as he must, that if respondent's property interest had been violated, there would have been a clear entitlement to back pay, but he argues inconsistently that this should not be the result where it is the liberty interest instead that has been invaded. The injury is identical; when either the property or the liberty interest has been violated by discharge without notice and hearing, and a period of unemployment follows, there has been a salary or wage loss.

The invasion of the liberty interest wrongfully impedes the employee's opportunity to secure new employment, just as the infringement of the property interest illegally deprives the employee of his existing job. The district court made careful findings concerning respondent's diligent and good faith efforts to secure a new job, and carefully limited her back pay entitlement only to that period during which such efforts were being made. Back pay was treated by the court as an equitable remedy in this case, and no damages, as such, were awarded. (Petition for Certiorari A-7 to 9). Certainly what the district court did with regard to back pay was consistent with prior decisions of this Court. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Also it must be observed that respondent, who is so quick to accuse petitioner of litigating issues not raised by the pleadings, did not present to the court of appeals the question of whether back pay should have been awarded, so that this Court should decline to review the matter. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952) and Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE PARTIES HAD LITIGATED BY CONSENT THE ISSUE OF WHETHER RESPONDENT'S LIBERTY INTEREST HAD BEEN VIOLATED BY THE DISCHARGE FROM PUBLIC EMPLOYMENT.

Petitioner claims that he was ambushed in this case, that the judgment of the district court was the first notice he received of respondent's claim that her procedural due process rights had been violated. The record establishes this assertion to be false.

All of the evidence concerning petitioner's publication of reasons for the dismissal of respondent, was admitted without interposition of objection by petitioner. Generally implied consent by the parties to try an issue is found from the circumstance alone that evidence on that issue is introduced without objection. 6 Wright and Miller, Federal Practice and Procedure: Civil, sec. 1493, p. 463 and n.68 (1971); Norris v. Bovina Feeders, Inc., 492 F.2d 502 (5th Cir. 1974); Arkla Exploration Co. v. Boren, 411 F.2d 879 (8th Cir. 1969).

In the present case, however, evidence of petitioner's consent to trial of the procedural due process issue goes far beyond the mere failure to object. The district court requested from the parties supplementary briefs and proposed findings of fact and conclusions of law following the trial. One of the two major arguments of respondent's supplementary trial brief was that petitioner had denied her procedural due process, that "Because stigmatizing charges were made against plaintiff, which she was not given an opportunity to test or refute, her Fourteenth

Amendment 'liberty' interest was violated by the discharge in this case." (Record, No. 31, pp. 3-4). Both petitioner and respondent filed a proposed finding of fact No. 12, which pertains to the procedural due process claim:

> 12. Defendant believed the report received from Deputy Sheriff Knight. He instructed his administrative assistant on February 9, 1973, to discharge plaintiff. The order was carried out on the same date. Defendant's asserted reasons for discharging plaintiff were that she had become intoxicated and that she had engaged in immoral conduct with married men.

Respondent offered a proposed conclusion of law to the effect that "Because plaintiff's good name, reputation, honor and integrity were stigmatized by the allegations that she had become intoxicated and had engaged in immoral sexual conduct, plaintiff was entitled to a pre-discharge notice and hearing." (Record, No. 31).

After having been duly served with respondent's trial brief and proposed findings of fact and conclusion of law clearly dealing with the liberty interest question, and after

having concurred in the part of the findings of fact that related to this point, petitioner at least should have filed a motion for a new trial or to set aside the judgment under Rule 60 of the Rules of Civil Procedure, at a time when his claimed error could have been cured by the district court. Petitioner did not do so, however. Even in petitioner's opening brief in the United States Court of Appeals for the Fourth Circuit, there was no mention made of the alleged trial of this issue without consent. It was not until after respondent's brief was filed in the court of appeals, that petitioner came up with this new idea in a reply brief.

This case must be held to come within the provision of Rule 15(b) of the Rules of Civil Procedure that, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Moreover, the district court's determination that issues have been tried by consent is a discretionary one, and will not be reversed, except upon a showing of abuse. 6 Wright and Miller, Federal Practice and Procedure: Civil, sec. 1493, p. 469 and n.74; Lones v. Detroit, Toledo and Ironton Railway Company, 398 F.2d 914 (6th Cir. 1968), cert. den., 393 U.S. 1063 (1968); Cole v. Layrite Products Co., 439 F.2d 958 (9th Cir. 1971).

Last in this connection petitioner faults the court of appeals for making its own findings to the effect that petitioner's stigmatizing statements about respondent were publicized close in time to her discharge. The evidence in this point is not conflicting. The court of appeals is empowered to make findings based on uncontroverted evidence when the trial court did not do so. Atkins v. Greenville Ship Building Corporation, 411 F.2d 279 (5th Cir. 1969); Gediman v. Anheuser Busch, Inc., 99 F.2d 537 (2d Cir. 1962); Damanti v. A/S Inger, 314 F.2d 395 (2d Cir. 1963). If petitioner claimed that he had evidence to contradict that which he himself has admitted on cross examination, then his remedy was to seek relief in district court under Rule 60 of the Rules of Civil Procedure, and not to petition this Court for certiorari.

III. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED FOR FAILURE TO FILE PETITION FOR WRIT OF CERTIORARI WITHIN THE TIME ALLOWED.

Petition for writ of certiorari in this proceeding is dated January 4, 1977, and was mailed to the Court on January 5, 1977, according to the covering letter.

The decision of the United States Court of Appeals for the Fourth Circuit, which is sought to be reviewed in this proceeding,

was filed September 17, 1976. (Petition for Certiorari A-10).

A petition for writ of certiorari seeking to review the decision of a United States court of appeals in a civil case must be filed within 90 days after the entry of the judgment or decision. 28 U.S.C. sec. 2101(c); Rule 22.3, Supreme Court Rules. No application for extension of time within which to file the petition has been sought to the best of respondent's knowledge. More than 90 days separates the date of decision of the United States Court of Appeals for the Fourth Circuit and the date of filing of the petition in this Court. Accordingly, the petition for writ of certiorari should be denied as not timely filed. Bradford Electric Light Co. v. Clapper, 284 U.S. 221 (1931).

Petitioner did file a petition for rehearing in the court of appeals, and this petition was denied on October 21, 1976. (Petition for Certiorari, A-11). However, the judgment of the court of appeals was entered on September 17, and the petition to rehear should not be regarded as having the effect of extending the statutory 90 day period for petition for certiorari. This is so because under the present Rule 41, Rules of Appellate Procedure, a formal mandate no longer issues, and the opinion and

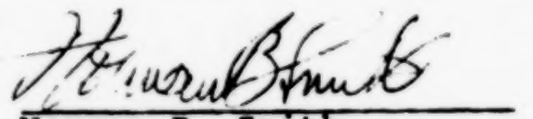
judgment of the court operate as the mandate, Warren v. United States, 358 F.2d 527 (D.C. Cir. 1965); and also because Rule 41(b) now contains provisions for stay of the court of appeals mandate pending application to the Supreme Court for writ of certiorari, so that is is possible for the mandate not to have issued at all before the petition for certiorari is filed. Were it not for these provisions, perhaps it could be argued that the petition for rehearing tolled the 90 day limit for filing the certiorari petition. See Department of Banking v. Pink, 317 U.S. 264 (1942).

CONCLUSION

For the reasons stated in Part III of respondent's reasons, the petition for certiorari should be dismissed as not timely filed. Alternatively, for the reasons stated in Parts I and II of respondent's reasons, the petition for certiorari should be denied, since the decision of United States Court of Appeals for the Fourth Circuit is consistent

with the decisions of this Court.

Respectfully submitted,



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